In The

Supreme Court of the United States

October Term, 1977

No. 77-1261

JUNE MYSLAJEK, IRWIN L. POLLACK,
and I. L. POLLACK & ASSOCIATES, INC.,

Petitioners,

vs.

UNITED STATES OF AMERICA
and ROBERT J. PYLE, Special Agent
of the Internal Revenue Service,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

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No. .....

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Petitioners June Myslajek, Irwin L. Pollack, and I. L. Pollack & Associates, Inc. respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on December 12, 1977 which affirmed the enforcement of two Internal Revenue summonses.

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OPINION BELOW

The opinion of the court of appeals, not yet reported, appears in Appendix B of this Petition. The memorandum order of the United States District Court for the District of Minnesota appears at 440 F. Supp. 5 and in Appendix B.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on December 12, 1977. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED

1. May Internal Revenue summonses be used to obtain records where the sole objective of the agent at the time he issues the summonses was to gather evidence for criminal prosecution of the taxpayers?

2. May Internal Revenue summonses be enforced where the government has previously inspected and possessed the records sought and thereby cannot demonstrate that the information is not already within its possession?

3. May Internal Revenue summonses be enforced where the government has previously inspected and had

possession of the records sought and fails to give notice that a second inspection is necessary as required by I. R. C. § 7605(b)?

4. May Internal Revenue summonses be enforced where they were served at the summonee's business office and not personally or at her last and usual place of abode as required by I. R. C. § 7603?

STATUTORY PROVISIONS INVOLVED

This case involves §§ 7602, 7603, and 7605(b) of the Internal Revenue Code, 68A Stat. 901 and 902. Their text is set forth in Appendix A to this Petition.

STATEMENT OF THE CASE

This is an action commenced by respondents, the United States and Robert J. Pyle, a Special Agent of the Internal Revenue Service, seeking enforcement of two Internal Revenue summonses directed at petitioner June Myslajek (pronounced my-zlack), an accountant. The summonses sought production of records of two of her clients, petitioners Irwin L. Pollack (Pollack) and I. L. Pollack & Associates, Inc. (Associates), together with her workpapers. Respondents sought enforcement in the United States District Court for the District of Minnesota pursuant to I. R. C. § 7402(b) and § 7604(a). After allowing Pollack and Associates to intervene, that court entered an order enforcing both summonses except as to

records concerning Pollack's personal income tax return for 1975. The Eighth Circuit affirmed the order. Following the Eighth Circuit's denial of petitioners' motion to stay issuance of the mandate, on February 1, 1978, Mr. Justice Blackmun granted petitioner's application for a stay of enforcement (No. A-618).

Revenue Agent Mark Cohen began an audit of the calendar year 1973 income tax return of Associates on April 17, 1975. He later expanded his inquiry to include tax years 1972, 1973, 1974 and 1975 of both Associates and Pollack. Many of Associates' records and some of Pollack's were at the office of Mrs. Myslajek. Agent Cohen went to Mrs. Myslajek's office to conduct his audits where he reviewed documents and questioned Mrs. Myslajek concerning the returns and documents. Mrs. Myslajek gave Cohen all documents he requested which were in her possession and obtained for him from elsewhere some bank statements. Mrs. Myslajek did not have in her possession all the documents Agent Cohen wanted or requested.

Agent Cohen then took the documents into his possession for further review and inspection by him and other IRS personnel. On September 30, 1975, he took the records for 1973. On December 1, 1975 he took the records for 1972. Those documents were returned to Mrs. Myslajek on March 19, 1976, for submittal by her in response to a subpoena in a divorce proceeding in which Pollack was a party. On April 15, 1976, Agent Cohen obtained from Mrs. Myslajek the records for 1974 and 1975. He returned those records to her on June 24, 1976 in response to a second subpoena in the divorce action.

The Internal Revenue Service has never given a notice to either taxpayer pursuant to I. R. C. § 7605(b) that a second examination or inspection of their books and records was necessary.

On July 7, 1976, Agent Cohen completed and filed an IRS form entitled "Referral Report For Potential Fraud Cases", Form 2797, for each of the taxpayers. Such a report is prepared by an auditing revenue agent when he has determined there is potential criminal culpability present. The report is sent to the Intelligence Division where a Spcial Agent is assigned who examines the report to determine whether or not it should be accepted for investigation by that Division. The decision to accept or reject the referral depends upon the criminal potential of the case. In his fraud referral report Agent Cohen alleged Associates understated its gross receipts for 1972 and 1973 by a total of some $90,000 and deducted personal expenses of Pollack for 1972-1975 of more than $125,000. He claimed those improper corporate deductions should be income to Pollack for the years in question and that he failed to report as income $20,000 in corporate receipts deposited in his personal account. The referral was accepted by the Intelligence Division on August 3, 1976. After the referral report was accepted, Agent Cohen turned over everything in his possession to the Intelligence Division.

Following an interview with Pollack, Special Agent Pyle of the Intelligence Division went to Mrs. Myslajek's business office on August 24, 1976 and served her adult son with the summonses at issue. Mrs. Myslajek was not in the office at the time. She appeared on Sep-

tember 8, 1976 as directed by the summonses and objected to producing the documents demanded.

On November 1, 1976, respondents commenced this action by filing a petition requesting an order that Mrs. Myslajek comply with the summonses. An order to show cause was signed on November 10, 1976 and was served on Mrs. Myslajek, together with the petition, on November 16, 1976. The order required her to file a written response to the petition within five days of service and ordered her to appear on December 17, 1976. Mrs. Myslajek filed a timely answer to the petition and hearings were held on December 17, 1976 and March 2, 1977, in and at which Mrs. Myslajek brought into issue the adequacy of the service of the summonses upon her and other issues. After allowing the taxpayers to intervene, on April 22, 1977, the district court entered an order enforcing the summonses except as to Pollack's 1975 tax year. Subsequent orders stayed enforcement of the summonses pending appeal. A notice of appeal was filed May 31, 1977, and on December 12, 1977, the Eighth Circuit issued its opinion and judgment affirming the district court.

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REASONS FOR GRANTING THE WRIT

The decision below conflicts in principle with the decisions of other courts of appeals and raises critical questions concerning the use of the summons power by internal revenue agents.

The decision below creates a conflict between the court of appeals on two of the questions presented. In affirming the district court's summary rejection of the

criminal purpose defense (*infra*), the Eighth Circuit ignored the decision in *United States v. LaSalle National Bank*, 554 F. 2d 302 (7th Cir. 1977), *cert. granted*, No. 77-365, — U. S. —, 98 S. Ct. 632 (Dec. 8, 1977) as well as decisions in other circuits. Similarly, the Eighth Circuit's upholding of the district court's conclusion that the government had established the information sought was not already in its possession cannot be squared with the decision in *United States v. Pritchard*, 438 F. 2d 969 (5th Cir. 1971).

In addition to creating conflicts with other courts of appeals on those issues, this case involves two other questions also relating to the procedures for enforcement of the internal revenue laws and affecting thousands of taxpayers who are audited each year. One is the statutory requirement that a superior approve a second inspection of records. The other is the statutory prescription of the manner of serving a summons. This Court has expressed its appreciation of such limitations on the inquisitorial power. *See, United States v. Bisceglia*, 420 U. S. 141, 146 (1975); *United States v. Powell*, 379 U. S. 48 (1964). The presence of such questions necessitates a grant of certiorari. *See, Donaldson v. United States*, 400 U. S. 517, 522 (1971).

1. Criminal Purpose

In *Reisman v. Caplin*, 375 U. S. 440 (1964), this Court stated that the appropriate grounds for challenging a summons under I. R. C. § 7602 included that "the material is sought for the improper purpose of obtaining evidence for use in a criminal prosecution." *Id.* at 449. *See, United States v. O'Connor*, 118 F. Supp. 248 (D.

Mass. 1953). *See also, United States v. Powell,* 379 U.S. at 57-58.

Donaldson v. United States, after affirming the denial of a taxpayer's motion to intervene, went on to explicate the "criminal purpose" defense set forth in *Reisman.* It stated that the *Reisman* language described a situation "where the sole object of the investigation is to gather data for criminal prosecution", and that the criminal purpose defense "comes into proper focus as applicable to the situation of a pending criminal charge, or, at most, of an investigation solely for criminal purposes." 400 U.S. at 533. The concluding paragraph of the opinion stated: "We hold that under § 7602 an internal revenue summons may be issued in aid of an investigation if it is issued in good faith and prior to a recommendation for criminal prosecution." *Id.* at 536.

In applying *Reisman* and *Donaldson,* the courts of appeals, except for the Eighth Circuit, have held the criminal purpose defense is available where the sole purpose of the agent in issuing the summons is to gather evidence for a criminal prosecution, without regard to whether there has been a formal recommendation for prosecution. Some have read the concluding paragraph of *Donaldson* as requiring both good faith and the absence of a recommendation for prosecution, and then held that where the sole objective of the investigation is criminal prosecution the government is not acting in good faith. *United States v. LaSalle National Bank*; *United States v. Zack,* 521 F. 2d 1366 (9th Cir. 1975); *United States v. Wall Corp.,* 475 F. 2d 893 (D.C. Cir. 1972). Others have stressed the *Donaldson* language which approvingly discusses *Reisman* and have arrived at the same result; where the sole purpose of the issuance of the summons is a criminal prosecution it should not be enforced without regard to whether a formal recommendation for prosecution has been made. *United States v. Wright Motor Co.,* 536 F. 2d 1090 (5th Cir. 1976); *United States v. Weingarden,* 473 F. 2d 454 (6th Cir. 1973). *See, United States v. Bray,* 546 F. 2d 851 (10th Cir. 1976); *United States v. Friedman,* 532 F. 2d 928 (3d Cir. 1976); *United States v. Lafko,* 520 F. 2d 622 (3d Cir. 1975); *United States v. McCarthy,* 514 F. 2d 368 (3d Cir. 1975).

Here petitioners contended that at the time Special Agent Pyle issued the summonses he was solely interested in obtaining evidence for a criminal prosecution of Pollack and Associates. The district court summarily rejected the defense, stating,

> [A]s yet the IRS has made no recomendation that a criminal prosecution of either Pollack or of Associates be initiated. It is irrelevant that the IRS is conducting a criminal investigation because the IRS also has a valid civil tax purpose for the investigation—determining the correct and as yet undetermined civil tax liabilities of Pollack and of Associates.

Appendix, p. 12, *infra.*

The district court thus failed to focus on the motives and purposes of Special Agent Pyle. It was his purpose which was crucial to determine whether the summonses were issued in good faith. Instead, the court considered the overall responsibility of the IRS for enforcing the tax laws. Indeed, the district court placed heavy reliance on the mere fact that civil tax liability had yet to

be determined. It appeared to create a doctrine that as long as there is any question of civil tax liability the good faith of the summons issuer may not be challenged. In affirming, the Eighth Circuit confirmed such a proposition.

That proposition is manifestly in conflict with the decisions of the other courts of appeals cited above. Most directly, in *LaSalle National Bank,* the court denied enforcement of two summonses because the sole purpose of the issuing special agent was criminal, despite the facts that the investigation was not complete, that the special agent had made neither a preliminary investigative report nor a recomendation for criminal prosecution, and that the agent "testified that the purpose of his investigation was 'to determine the tax liabilities for the years under investigation.' " 544 F. 2d at 304; 76-1 USTC ¶ 9704 (N. D. Ill. 1976).

LaSalle National Bank demonstrates that the fact that another part of the IRS or the special agent himself has an interest in eventually determining civil tax liability is not determinative of whether the special agent lacks good faith because of his solely criminal purpose at the time a summons is issued. That civil tax liability is undetermined cannot justify a special agent's use of the civil summons power in a criminal investigation. Questions concerning civil liability virtually always exist in connection with criminal income tax evasion investigations. If nothing else civil is in dispute, the potential for fraud penalties will serve as the "civil" liability which the IRS may use to justify the summons under the rationale of the district court. To permit that analysis to stand would be to vitiate any criminal purpose defense.

2. Possession of the Information

In *United States v. Powell,* this Court set forth as an element the government must prove to establish a *prima facie* case for enforcement of an Internal Revenue summons that "the information sought is not already within the Commissioner's possession . . . ." 379 U. S. at 57-58. *Powell*'s requirements were specifically reaffirmed in *Donaldson v. United States,* 400 U. S. at 526-27.

Here the district court recognized the undisputed fact that most, if not all, of the summoned documents had previously been provided Revenue Agent Cohen. Appendix, p. 12, *infra.* Indeed, in Special Agent Pyle's affidavit in support of the petition for enforcement, he failed to aver that the IRS did not have the information in its possession. Nevertheless, the district court concluded the information in those records was not already within the possession of the IRS.

The Eighth Circuit's affirmance brings it in conflict with *United States v. Pritchard,* 438 F. 2d 969 (5th Cir. 1971). There, the Fifth Circuit affirmed denial of enforcement of a summons on the ground that the government had failed to establish the information sought was not already in its possession. It stated,

> It is undisputed that prior to the service of the summons on Pritchard, accountant Hullet had met with IRS agent Adams. Hullett testified that Adams had looked at all copies of taxpayers' papers in Hullett's file; that Adams' investigation lasted for several weeks; and that together he and Adams had spent a total of three or four hours examining the file.
>
> It is clear that the information sought by the summons was already within the Commissioner's possession.

Id. at 971. *Pritchard* was cited with approval by this Court in *United States v. Bisceglia*, 420 U. S. at 146. *See, United States v. London Insurance Agency, Inc.*, 76-2 USTC ¶ 9735 (D. R. I. 1976) (*Powell* and *Pritchard* compel denial of summons enforcement where revenue agent had examined documents and performed various analyses of them although agent had not made a detailed examination of each item or obtained possession of the documents).

The facts in this case are even more conclusive against the government than in *Pritchard* or *London Insurance Agency, Inc.* In neither case had the revenue agent obtained sole possession of the summoned documents, transported them to his own office, had other IRS personnel examine them, made copies of any of them he wished, and retained the documents for several months, all of which occurred here. The Eighth Circuit's affirmance conflicts with *Pritchard* and creates confusion over the meaning of *Powell*'s requirement that the government show it is not possessed of the information.[1]

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1 In opposing a stay pending application for certiorari, the government argued that in *Powell* this Court had implicitly decided that prior examination was insufficient to show the information sought was already in the IRS's possession. *See,* Memorandum for Respondents in Opposition to Application for Stay Pending Certiorari at 2-3. However, that issue was not discussed in *Powell,* and the Court's action in reversing the judgment and remanding for further proceedings consistent with the opinion left it open to the lower courts to conclude the information sought was already in the government's possession. Further, the government's attempt to distinguish *Pritchard* from this case ignores the fact that here, as in *PRITCHARD,* the special agent's affidavit failed to state the information was not in the government's possession.

3. Second Inspection

I. R. C. § 7605(b) provides that "only one inspection of a taxpayer's books of account shall be made for each taxable year unless the taxpayer requests otherwise or unless the Secretary or his delegate, after investigation, notifies the taxpayer in writing that an additional inspection is necessary." In *United States v. Powell,* compliance with the requirement of notice for a second inspection was held to be an essential requirement which the government must prove to obtain enforcement. 379 U. S. at 57-58.

The applicability of § 7605(b) to this case is manifest. Revenue Agent Cohen had previously examined and had possession of the summoned documents. Appendix, pp. 4, 12, *infra.* It was undisputed that no notice of a second inspection was given to either Pollack or Associates. Appendix, p. 13, *infra.* There was no evidence that either taxpayer had requested a second inspection. The fact that Mrs. Myslajek rather than the taxpayers possessed the records makes no difference in the applicability of § 7605(b). *United States v. McCarthy,* 514 F. 2d 368, 376 (3d Cir. 1975).

The district court, however, held § 7605 (b) inapplicable on the ground that the IRS investigation was "a continuing one." Appendix p. 13, *infra.* The court of appeals appeared to rest its decision on the same theory. Appendix, p. 7, *infra.*

Such an interpretation violates the language and purpose of the statute. It bars a second "inspection" of the same records in the absence of the requisite notice. There is no language in the statute referring to or creat-

ing an exception for "continuing" investigations. Nor is it permissible to construe "inspection" to mean "investigation." In *Powell* the Court examined the legislative history of § 7605(b), finding it was enacted because, "Congress recognized a need for a curb on the investigating powers of low-echelon revenue agents, and considered that it met this need simply and fully by requiring such agents to clear any repetitive examinations with a superior." 379 U. S. at 55-56.[2] Construing "inspection" to mean "investigation" would defeat that purpose, since by merely omitting the formal step of closing an investigation an IRS agent could exempt himself from ever having to apply to a superior for a determination that a second inspection was necessary.

Indeed, since there is no statutory requirement that the IRS ever formally close an investigation, the "continuing investigation" theory would require courts to inquire into the amount and nature of investigatory activity required to make an investigation "continuing." Such an inquiry would be both difficult and unnecessary. As *Powell* shows, Congress wanted a definite standard and provided one in § 7605(b). Under the statute, the only question is whether the IRS has previously viewed the

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2 In *Powell,* the Court quoted the Senate manager of the bill which became § 7605(b) responding to a question as follows:

"Mr. WALSH. . . . And this provision of the Senate committee seeks to limit the inspection to one visit unless the commissioner indicates that there is necessity for further examination?

Mr. PENROSE. That is the purpose of the amendment." *Id.* at 54.

documents. If it has, the agent desiring a second inspection must clear it with his superior.

There is no question but that a second inspection of the same records may well be "necessary" during an investigation. Section 7605(b) does not forbid that second inspection, but instead merely requires the determination of necessity be made by "the Secretary or his delegate" rather than by the agent. It is this division of decision-making power which was Congress' purpose in § 7605(b). The "continuing investigation" theory advanced by the courts below defeats this purpose by allowing the agent to make the determination of necessity on his own.

None of this Court's prior cases have definitively explained when the requirement of notice for a second inspection is triggered. In *United States v. Powell,* the Regional Commissioner had determined an additional examination of the records was necessary and had given the required notice. 379 U. S. at 49-50. In *Ryan v. United States,* 379 U. S. 61 (1964), the petitioner did not seek review of the court of appeals' determination that a necessity letter was not required because there had been no previous examination, and this Court noted, "The propriety of the court's interpretation of the necessity letter requirement of § 7605(b) is, therefore, not before us." *Id.* at 62 n. 4.

Several of the courts of appeals have dealt with the question. Some have held the first inspection must be a "completed" one for the statute to apply, *United States v. Kendrick,* 518 F. 2d 842, 850 (7th Cir.), *cert. denied,* 423 U. S. 1016 (1975); *United States v. House,* 524 F. 2d

1035, 1043 (3d Cir. 1975), and that the government is entitled to one "meaningful" examination. *United States v. Bell*, 448 F. 2d 40, 42 (9th Cir. 1971); *United States v. Giordano*, 419 F. 2d 564, 567 (8th Cir. 1969), *cert. denied*, 397 U. S. 1037 (1970). Other cases have held the statute inapplicable where the agent never actually saw the documents in question, *United States v. Schwartz*, 469 F. 2d 977, 981 (5th Cir. 1972), or where the documents sought were not the taxpayer's "books of account." *Hinchcliff v. Clarke*, 371 F. 2d 697, 700 (6th Cir.), *cert. denied*, 387 U. S. 941 (1967).

It is apparent that here the IRS had the "meaningful" inspection to which it was entitled. Revenue Agent Cohen had sole possession of the records for several months. After he voluntarily returned them, he ceased any further activity and prepared a fraud referral report. When Special Agent Pyle then demanded the production of the very same records, he was clearly seeking a repetitive inspection within the meaning of § 7605(b).

Congress has expressly required such an inspection be authorized by a superior. Since the decision below fails to apply § 7605(b) in accordance with its plain language and legislative history, it is this Court which must insure Congress' command be respected.

4. Service of Summons

I. R. C. § 7603 demands that a summons "shall be served by the Secretary or his delegate, by an attested copy delivered in hand to the person to whom it is directed, or left at his last and usual place of abode." The two summonses here were not served personally on Mrs.

Myslajek or left at her home. Instead they were served upon her adult son at her business office. Appendix, p. 5, *infra*.

The lower courts recognized the failure of the government to comply with § 7603. The district court, however, deemed the service at Mrs. Myslajek's business office to be equivalent to service at her "last and usual place of abode," because "to deny enforcement" because of noncompliance "would be exalting form over substance." Appendix, pp. 5-6, *infra*. The court of appeals disagreed with that analysis but affirmed on the ground that Mrs. Myslajek waived compliance with § 7603, apparently by not expressing that objection until her timely answer to the petition for enforcement. Appendix, p. 6, *infra*.

The positions of both courts are untenable. The theory espoused by the district court—that compliance with § 7603 was merely a matter of form—ignores Congress' express command to the IRS. Service at a business office is not service at a "place of abode." *See, United States v. N. Tully Semel, Inc.*, 88 F. Supp. 732 (D. Conn. 1949) (service of IRS summons at business office did not satisfy requirement of service at usual place of abode; action dismissed). *See also, Rabiolo v. Weinstein*, 357 F. 2d 167 (7th Cir. 1966), *cert denied*, 391 U. S. 923 (1968); *Bell v. Hosse*, 31 F. R. D. 181 (M. D. Tenn. 1962).

The Eighth Circuit's waiver theory is also flawed. Until an answer to the petition was required, Mrs. Myslajek surely had no duty to give the IRS gratuitous legal advice on how to serve a summons. Only if she had not

raised the objection in her answer would there be a waiver under Fed. R. Civ. P. 12(h). Indeed, the only case cited by the Eighth Circuit for its waiver theory, *United States v. Gajewski*, 419 F. 2d 1088 (8th Cir. 1969), *cert. denied*, 397 U. S. 1040 (1970), merely applied Rule 12(h) in holding the respondents had waived their personal jurisdiction objection by not presenting it by motion or in an answer. Here, Mrs. Myslajek did object in her timely answer, "The summonses petitioners seek to enforce were not served on respondent in accordance with 26 U. S. C. § 7603." Neither Rule 12 (h) nor *Gajewski* support the waiver theory.

More fundamentally, the established rule is that the obligations of a summonee and the enforceability of a summons are fixed as of the date of service. In *Couch v. United States*, 409 U. S. 322, 329 n.9 (1973), this Court held a transfer of records after service of summonses was irrelevant, and stated, "The rights and obligations of the parties became fixed when the summons was served, and the transfer did not alter them." *See, United States v. Rosinsky*, 547 F. 2d 249, 254 (4th Cir. 1977); *United States v. Kasmir*, 499 F. 2d 444, 450-51 (5th Cir. 1974), *rev'd on other grounds*, 425 U. S. 391 (1976); *United States v. Cromer*, 483 F. 2d 99, 101 (9th Cir. 1973); *United States v. Lyons*, 442 F. 2d 1144, 1146 (1st Cir. 1971); *United States v. Zakutansky*, 401 F. 2d 68, 72 (7th Cir. 1968), *cert denied*, 393 U. S. 1021 (1969); *United States v. Cecil E. Lucas General Contractor, Inc.*, 406 F. Supp. 1267, 1273 (D. S. C. 1975). Subsequent events cannot alter the summons and are irrelevant to the determination whether it should be enforced. *See, e.g., United States v. Rosinsky* (formal recommendation for criminal

prosecution occurring after district court order enforcing summons did not moot enforceability); *United States v. Edmond*, 355 F. Supp. 435 (W. D. Okla. 1972) (accountant served with summons who then delivered records to taxpayer from whom they were burglarized held guilty of civil contempt).

The decision below purported to cure the defective service of the summonses by reliance on Mrs. Myslajek's lack of immediate objection. She had, however, no duty to assist the government, nor any obligation to raise the objection until her answer was due.

Moreover, the court of appeals appeared to assume that the government would have cured its noncompliance with § 7603 by a second service. Appendix, p. 6, *infra*. Such an assumption is contrary to the record. In the district court, counsel for the government stated that such service was "normal, usual procedure," and that summonses "have always been served on accountants' offices." In its brief in the Eighth Circuit the government did not argue any waiver had occurred or that it would have cured the noncompliance with § 7603 by a second service, but merely persisted in its position that it did not have to obey the command of the statute and that any form of actual notice of the summons—presumably including mail or telephone—is sufficient. The assumption that the government would have attempted to cure the defective service is groundless.

The government's firm position that it does not have to comply with the express statutory command of Congress in serving summonses is disturbing. So is the de-

parture from established principles occasioned by the Eighth Circuit's waiver theory. If § 7605(b) is to have any substance, it is this Court which must supply it.

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CONCLUSION

In § 7602 Congress entrusted the IRS with broad summons power for use in civil tax investigations. An agent may summon "any person [he] may deem proper" to appear at the time and place of the agent's choice and to produce records and give sworn testimony "as may be relevant or material to such inquiry." This Court has recognized the encompassing sweep of the summons power, and that "such investigations unquestionably involve some invasion of privacy." *United States v. Bisceglia*, 420 U. S. at 146.

In *Bisceglia* the Court further stated,

> We recognize that the authority vested in tax collectors may be abused, as all power is subject to abuse. However, the solution is not to restrict that authority so as to undermine the efficacy of the federal tax system, which seeks to assure that taxpayers pay what Congress has mandated and to prevent dishonest persons from escaping taxation thus shifting heavier burdens to honest taxpayers. Substantial protection is afforded by the provision that an Internal Revenue Service summons can be enforced only by the courts. 26 U. S. C. § 7604(b); *Reisman v. Caplin*, 375 U. S. 440 (1964). Once a summons is challenged it must be scrutinized by a court to determine whether it seeks information relevant to a legitimate investigative purpose and is not meant "to harass the taxpayer or to put pressure on him to settle a collateral dispute, or for any other purpose reflecting on the good faith of the particular investigation." *United States v. Powell, supra*, at 58. The cases show that the federal courts have taken seriously their obligation to apply this standard to fit particular situations, either by refusing enforcement or narrowing the scope of the summons.

Id. at 146. As acknowledged in *Bisceglia*, both this Court and Congress have recognized the necessity of imposing some restrictions on the inquisitorial power of the IRS. Exactly such restrictions are at issue here: the criminal purpose defense; *Powell*'s requirement that the information sought not already be within the IRS's possession; the specific statutory requirement of notice for a second inspection; and the statutory prescription of the manner of service of a summons. The failure of the courts below to apply those restrictions demands this Court's review.

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Eighth Circuit.

Respectfully submitted,

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March, 1978.

APPENDICES

APPENDIX A

Internal Revenue Code:

§ 7602. *Examination of books and witnesses*

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

§ 7603. *Service of summons* (1970) (amended 1976)

A summons issued under section 6420(e)(2), 6421(f)(2), 6424(d)(2), 6427(e)(2), or 7602 shall be served by the Secretary or his delegate, by an attested copy delivered in hand to the person to whom it is directed, or left at his last and usual place of abode; and the certificate of service signed by the person serving the summons shall be evidence of the facts it states on the hearing of an application for the enforcement of the summons. When the summons requires the production of books, papers, records, or other data, it shall be sufficient if such books, papers, records, or other data are described with reasonable certainty.

§ 7605. *Time and place of examination*

* * *

(b) *Restrictions on examination of taxpayer.*— No taxpayer shall be subjected to unnecessary examination or investigations, and only one inspection of a taxpayer's books of account shall be made for each taxable year unless the taxpayer requests otherwise or unless the Secretary or his delegate, after investigation, notifies the taxpayer in writing that an additional inspection is necessary.

APPENDIX B

UNITED STATES COURT OF APPEALS
For The Eighth Circuit

No. 77-1471

United States of America and Robert J. Pyle,
Special Agent of the Internal Revenue Service,
Appellees,

vs.

June Myslajek, Irwin L. Pollack, and
I. L. Pollack & Associates, Inc.,
Appellants.

Appeal from the United States District Court
for the District of Minnesota

Submitted: September 2, 1977
Filed: December 12, 1977

Before BRIGHT, ROSS, and HENLEY, Circuit Judges.
PER CURIAM.

Taxpayers Irwin L. Pollack and I. L. Pollack & Associates, Inc., and their accountant, June Myslajek, appeal from a district court[1] order enforcing summonses served upon Ms. Myslajek by the Internal Revenue Service. We affirm.

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1 The Honorable Donald D. Alsop, United States District Judge for the District of Minnesota. The district court opinion is published at — F. Supp. — (D. Minn. 1977).

The district court found the following facts:

The respondent is an accountant in possession of certain financial records relating to the tax liabilities of the intervenors, Irwin L. Pollack (Pollack) and I. L. Pollack & Associates, Inc. (Associates).

On April 17, 1975, Mark Cohen, an IRS revenue agent, began an audit of Associates' 1973 tax return. Cohen later expanded his audit to include the tax years 1972 through 1975. He also began an audit of Pollack individually. During his audits agent Cohen had access to at least some of the financial records relating to the tax liabilities of Pollack and of Associates which were in the respondent's possession. Agent Cohen made a preliminary determination that additional taxes were due from both Pollack and from Associates and that there were certain "badges of fraud" which had become apparent. Agent Cohen concluded his audit without making any final determinations as to the amount of additional tax owed, and on July 7, 1976, he filed a fraud referral report. [— F. Supp. at —.]

After examining the records at Ms. Myslajek's office, Agent Cohen took a number of the documents into his possession for further review. On March 19, 1976, he returned the documents to Ms. Myslajek so that she could comply with a subpoena in a divorce proceeding in which Mr. Pollack was a party. On April 15, 1976, Agent Cohen again took possession of the records. A second subpoena in the divorce matter required him to return the documents again on June 24, 1976. On August 24, 1976, the Internal Revenue Service served two summonses on Ms. Myslajek's son ordering her to produce the documents. Her refusal to do so led to this enforcement action.

Ms. Myslajek, along with the taxpayers as intervenors in this action, raises several issues on appeal. Only two

of these issues require discussion. As to the others, we find no error in the district court's opinion.

Ms. Myslajek claims that the summonses were improperly served. Section 7603 of the Internal Revenue Code requires that a summons either be served on the person to whom it is directed or be left at her "last and usual place of abode." The testimony in the enforcement proceeding established that Robert Pyle, a special agent of the IRS, served these two summonses upon Ms. Myslajek's adult son at her business office and spoke to Ms. Myslajek over the telephone. He advised her that the IRS required certain of the taxpayers' records, and she informed him that some of the records were at her office and others were in the trunk of her car. Ms. Myslajek appeared on September 8, 1976, in response to the summonses, but declined to testify or produce any documents. Instead, she presented a statement listing her objections to the summonses.[2] She did not at that time object to the defective service. The defect in service first surfaced almost three months after the delivery of the summonses when Ms. Myslajek, in her answer to the enforcement petition, moved to quash the summonses on grounds of insufficient service.

The district court rejected the motion to quash the summonses, stating that "to deny enforcement * * * would

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2 Her objections were as follows:

1. Evidence is being sought solely to make a criminal case against the taxpayer.

2. The information sought by the summons is already within the possession of the Commissioner of Internal Revenue.

3. The summons has been issued to harass the taxpayer and is an abuse of the court's process.

be exalting form over substance." The court deemed service at respondent's business office to be equivalent to service at Ms. Myslajek's "last and usual place of abode."

We agree with the result reached by the district court but not with its analysis. The record demonstrates that Ms. Myslajek received actual notice of the summonses on the day they were served but did not object to the defective service until almost three months later. Although she filed a statement objecting to the summonses on substantive grounds, she did not take that opportunity to raise any procedural issue. Had she voiced her objections at an earlier date, any defect in service could easily and inexpensively have been cured through a second service. Under the special circumstances of this case, we hold that Ms. Myslajek waived strict compliance with the requirements of section 7603. *See United States v. Gajewski,* 419 F. 2d 1088 (8th Cir. 1969), *cert. denied,* 397 U. S. 1040 (1970).

Ms. Myslajek further claims that the IRS failed to comply with the requirements of section 7605(b) of the Internal Revenue Code[3] for a second inspection of taxpayer's records. The district court rejected this argument with the following analysis:

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3 I. R. C. § 7605(b) provides:

> (b) Restrictions on examination of taxpayer. — No taxpayer shall be subjected to unnecessary examination or investigations, and only one inspection of a taxpayer's books of account shall be made for each taxable year unless the taxpayer requests otherwise or unless the Secretary or his delegate, after investigation, notifies the taxpayer in writing that an additional inspection is necessary.

> It is undisputed that neither Pollack nor Associates was given any notice that a second inspection was necessary. The respondent claims that any further examination of the financial records would constitute a second inspection. The government claims that the IRS investigation is a continuing one and that no second inspection notice was required. Although the matter is not free from difficulty, the court concludes that the IRS's investigation of the tax liabilities of Pollack and of Associates is a continuing one. When an investigation has not been completed, an examination of a taxpayer's books and records is not a second inspection even though the agents may have seen specific documents on a previous occasion. *United States v. Giordano,* 419 F. 2d 564 (8th Cir. 1969). [— F. Supp. at —.]

The question whether these summonses signaled the beginning of a second inspection or merely a continuation of the earlier one raises an issue of fact. Both parties agree that Agent Cohen returned the records in question to Ms. Myslajek because of the divorce proceeding. Agent Cohen testified that the records were returned because

> there was a divorce proceeding between Mr. Pollack and his wife, and that attorney had given June Myslajek a summons and • • • I was told on that date that the • • • records had to be back to her that afternoon • • •.

Ms. Myslajek's testimony was as follows:

> Q. And after that then Mr. Cohen received all of those documents back?
>
> A. I think they were all of them • • • but he did get them back from me again.
>
> Then they wanted them again for this trial, Mr. Pollack was going to finally get his divorce • • •.

Thus, the return of the records in itself does not indicate an end to the earlier inspection. Ms. Myslajek claims,

however, that Agent Cohen, upon returning the documents, told her he was through with them:

Q. And did he say anything when he brought those back?

A. Yes, he said—I said I would get them back to him and he said he was through with them • • •.

Agent Cohen's testimony differs:

Q. Did there come a point upon your investigation • • • when you told Mrs. Myslajek that you were done with the records?

A. That I was done with the records?

Q. That you were done with the records.

A. No.

• • •

Q. So that at no time when you returned any of the documents you told her—you did not tell her you were done with them, right?

A. Right.

We construe the district judge's conclusion that the investigation was "a continuing one" to mean that he accepted the testimony of Agent Cohen over the conflicting testimony of Ms. Myslajek.

The district court is in a better position than we are to judge the credibility of witnesses, and appellants have offered us no appropriate legal basis for overturning his findings of fact. Those findings render section 7605(b) inapplicable.

Thus we affirm.

A True copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

JUDGMENT

(Filed December 12, 1977)

UNITED STATES COURT OF APPEALS
For The Eighth Circuit

No. 77-1471 September Term, 1977

United States of America and
Robert J. Pyle, Special Agent
of the Internal Revenue Service,
Appellees,

vs.

June Myslajek; Irwin L. Pollack
and I. L. Pollack & Associates, Inc.
Appellants.

APPEAL FROM the United States District Court for the ———— District of Minnesota.

THIS CAUSE came on to be heard on the original designated record of the United States District Court for the ———— District of Minnesota and briefs of the respective parties and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed.

December 12, 1977

MEMORANDUM ORDER

4-76 Civ. 479

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

UNITED STATES OF AMERICA and
ROBERT J. PYLE, Special Agent
of the Internal Revenue Service,
Petitioners,

vs.

JUNE MYSLAJEK,
Respondent,

IRWIN L. POLLACK and I. L.
POLLACK & ASSOCIATES, INC.,
Intervenors.

Robert G. Renner, United States Attorney, by DANIEL M. SCOTT, Esq., Assistant United States Attorney, Minneapolis, Minnesota, together with JEFFREY D. SNOW, Esq., Department of Justice, Tax Division, Washington, D. C., appeared for petitioners.

JEROME TRUHN, Esq., and THOMAS V. SEIFERT, Esq., Head & Truhn, Minneapolis, Minnesota, appeared for respondents and intervenors.

This matter comes before the court as a result of the respondent's answer to the court's order to show cause why she should not be compelled to testify and to produce the records demanded by Internal Revenue Service (IRS) summonses served on her on August 24, 1976, by petitioner Robert J. Pyle (Pyle), a special agent of the IRS. The respondent moves to quash the summonses.

The respondent is an accountant in possession of certain financial records relating to the tax liabilities of the intervenors, Irwin L. Pollack (Pollack) and I. L. Pollack & Associates, Inc. (Associates).

On April 17, 1975, Mark Cohen, an IRS revenue agent, began an audit of Associates' 1973 tax return. Cohen later expanded his audit to include the tax years 1972 through 1975. He also began an audit of Pollack individually. During his audits agent Cohen had access to at least some of the financial records relating to the tax liabilities of Pollack and of Associates which were in the respondent's possession. Agent Cohen made a preliminary determination that additional taxes were due from both Pollack and from Associates and that there were certain "badges of fraud" which had become apparent. Agent Cohen concluded his audit without making any final determinations as to the amount of additional tax owed, and on July 7, 1976, he filed a fraud referral report.

The respondent contends that the court lacks personal jurisdiction over her. The court cannot agree. The petition and order to show cause are a sufficient means by which the court may acquire personal jurisdiction over a respondent who is summoned to provide testimony and records in an IRS proceeding. *United States v. Gajewski,* 419 F. 2d 1088 (8th Cir. 1969), *cert. denied,* 397 U. S. 1040 (1970); *see also Donaldson v. United States,* 400 U. S. 517, 528-29 (1971).

The respondent also contends that the petitioners have failed to establish their entitlement to the documents summoned. In order to enforce an administrative summons issued by the IRS the government must establish

> that the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to the purpose, that the information sought is not already within the [IRS's] possession, and that the administrative steps required by the code have been followed. . . .

United States v. Powell, 379 U. S. 48, 57-58 (1964).

The respondent first argues that the investigation is not being conducted pursuant to a legitimate purpose because the sole objective for which the summonses were issued is the obtaining of evidence for a possible criminal prosecution. It is clear that an IRS summons may be issued in aid of an investigation if it is issued in good faith and prior to a recommendation for criminal prosecution. *Donaldson v. United States, supra* at 536. It is also clear that as yet the IRS has made no recommendation that a criminal prosecution of either Pollack or of Associates be initiated. It is irrelevant that the IRS is conducting a criminal investigation because the IRS also has a valid civil tax purpose for the investigation—determining the correct and as yet undetermined civil tax liabilities of Pollack and of Associates. *See Donaldson v. United States, supra* at 531-36.

It is also clear that the IRS has not yet determined the intervenors' correct tax liabilities. Such a determination is a legitimate purpose. The records sought are relevant to that purpose.

The respondent next argues that the information sought is already within the IRS's possession. It is undisputed that the respondent previously provided agent Cohen with certain of the documents which the IRS now seeks. The simple fact that agent Cohen saw some of the

financial records on a prior occasion does not mean that the information contained therein is currently within his possession or that of the IRS. The court is convinced that the information which the IRS seeks to glean from the financial records which it has summoned is not information which is currently in the IRS's possession.

The respondent finally argues that the IRS has failed to follow the administrative steps required by the Internal Revenue Code. 26 U. S. C. § 7605(b) provides:

> No taxpayer shall be subjected to unnecessary examination or investigations, and only one inspection of a taxpayer's books of account shall be made for each taxable year unless the taxpayer requests otherwise or unless the Secretary or his delegate, after investigation, notifies the taxpayer in writing that an additional inspection is necessary.

It is undisputed that neither Pollack nor Associates was given any notice that a second inspection was necessary. The respondent claims that any further examination of the financial records would constitute a second inspection. The government claims that the IRS investigation is a continuing one and that no second inspection notice was required. Although the matter is not free from difficulty, the court concludes that the IRS's investigation of the tax liabilities of Pollack and of Associates is a continuing one. When an investigation has not been completed, an examination of a taxpayer's books and records is not a second inspection even though the agents may have seen specific documents on a previous occasion. *United States v. Giordano,* 419 F. 2d 564 (8th Cir. 1969).

The respondent finally contends that the use of the summons to obtain records concerning Pollack's 1975 tax

liability is improper. 26 U. S. C. § 7602 authorizes the use of summons to obtain a taxpayer's financial records

> [f]or the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability. . . .

It is undisputed that on August 24, 1976, the date on which the summons for Pollack's records was served, Pollack had not filed an individual tax return for 1975. It is also undisputed that, because an extension of time in which to file had been granted, Pollack's 1975 tax return was not yet due.

The court is convinced that, because the IRS was not attempting to ascertain the correctness of Pollack's 1975 tax return, its use of a summons to obtain financial records relevant thereto is not authorized.

Upon the foregoing,

IT IS ORDERED That the petition for enforcement of the summonses served on the respondent be and hereby is granted, and the respondent shall appear before Robert J. Pyle, an officer of the Internal Revenue Service, at Room 135, Federal Office Building, Third Avenue South and Washington Avenue, Minneapolis, Minnesota, on the 2nd day of May, 1977, at 9:00 A. M., for the purpose of giving testimony and producing financial records in the respondent's possession relating to the tax liability of I. L. Pollack & Associates, Inc., for the period January 1, 1970, through December 31, 1975, and to the tax liabil-

ity of Irwin L. Pollack for t..e period Jannary 1, 1972, through December 31, 1974.

DATED: April 22, 1977.

/s/ Donald D. Alsop

United States District Judge

No. 77-1261

In the Supreme Court of the United States

OCTOBER TERM, 1977

JUNE MYSLAJEK, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1261

JUNE MYSLAJEK, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioners contend that the court of appeals erred in enforcing two internal revenue summonses requiring petitioner June Myslajek, an accountant, to produce records of two of her clients, petitioners Irwin L. Pollack and I. L. Pollack & Associates, Inc.

On April 17, 1975, Revenue Agent Mark Cohen began an audit of the 1973 tax return of I. L. Pollack & Associates, Inc. He later expanded his audit to cover the years 1972, 1974 and 1975, and to include petitioner Irwin L. Pollack. Although Agent Cohen received some documents in the course of his examination, he subsequently returned them to petitioner Myslajek to enable her to comply with subpoenas in a divorce proceeding to which petitioner Pollack was a party. During the audit, Agent Cohen found certain indications of fraud and

referred the case to the Internal Revenue Service's Intelligence Division, where it was assigned to Special Agent Robert J. Pyle. On August 24, 1976, Agent Pyle issued two summonses to petitioner Myslajek, requiring her to produce specified documents in her custody. The summonses were left at her office with her adult son. Petitioner Myslajek appeared in response to the summonses, but she refused to produce the requested documents (Pet. App. 4). The government thereupon instituted this enforcement action.

The district court ordered enforcement of the summonses. The court found that the investigation had a valid civil tax purpose (Pet. App. 12), that even though Agent Cohen previously had seen some of the records, none of the records sought by the summonses were currently within the possession of the Internal Revenue Service (*id.* at 12-13), and that since the initial tax investigation had not been completed, a second inspection notice was not required by Section 7605(b) of the Internal Revenue Code of 1954, 26 U.S.C. 7605(b) (Pet. App. 13). The court of appeals affirmed *per curiam* (*id.* at 3-9).[1]

1. Petitioners argue (Pet. 6-10) that the decision of the court of appeals conflicts with *United States* v. *LaSalle National Bank*, 554 F. 2d 302 (C.A. 7), certiorari granted, No. 77-365, December 12, 1977. *LaSalle*, however, involved a refusal to enforce internal revenue summonses, even though they had been issued prior to a recommendation for prosecution, on the ground that the special agent's investigation was "solely for the purpose of unearthing evidence of criminal conduct * * *" (554 F. 2d at 305). While we have argued in *LaSalle* that the Seventh

[1]Mr. Justice Blackmun stayed the judgment of the court of appeals on February 1, 1978, pending this Court's disposition of the petition.

Circuit's characterization of that investigation as "solely for criminal purposes" misperceives the function of an Internal Revenue Service tax investigation and that its denial of enforcement is contrary to the standard announced by this Court in *Donaldson* v. *United States*, 400 U.S. 517, the conflict between *LaSalle* and *Donaldson* has no bearing on this case. Here, the district court specifically found that "the IRS also has a valid civil tax purpose for the investigation—determining the correct and as yet undetermined civil tax liabilities of Pollack and of Associates" (Pet. App. 12). Thus, the summonses to petitioner Myslajek would be enforced under the restrictive *LaSalle* test, as well as under any other court's interpretation of the *Donaldson* standard. Compare *United States* v. *Morgan Guaranty Trust Co.*, C.A. 2, No. 77-6191, decided February 6, 1978.

2. Relying on the fact that Revenue Agent Cohen had previously examined some of their records, petitioners contend (Pet. 11-12) that the court of appeals erred in enforcing the summonses because the information sought was already within the possession of the Internal Revenue Service. This Court, however, implicitly has rejected the identical argument in *United States* v. *Powell*, 379 U.S. 48. There, the officer of a corporation under investigation opposed the enforcement of a summons on the ground that the Internal Revenue Service had once examined the records in question and that the limitation on "unnecessary examination or investigations" in Section 7605(b) required the Commissioner to establish probable cause for suspecting fraud. Although the Court observed that, in order to obtain enforcement of a summons, the Commissioner "must show * * * that the information sought is not already within the Commissioner's possession * * *" (379 U.S. at 57-58), it nonetheless reversed

the judgment of the court of appeals prohibiting enforcement of the summons. Here, too, as the district court correctly noted (Pet. App. 12-13), simply because "agent Cohen saw some of the financial records on a prior occasion does not mean that the information contained therein is currently within his possession or that of the IRS."[2]

Similarly unmeritorious is petitioners' contention (Pet. 13-16) that the summonses are unenforceable because the Internal Revenue Service failed to issue a "second inspection" notice pursuant to Section 7605(b). That section requires a second inspection notice only where there has been a meaningful examination and resolution of a taxpayer's liability and, thereafter, the Internal Revenue Service seeks to reopen the examination and to reinspect the same records. See, *e.g.*, *United States* v. *Kendrick*, 518 F. 2d 842 (C.A. 7), certiorari denied, 423 U.S. 1016; *United States* v. *Schwartz*, 469 F. 2d 977, 983 (C.A. 5); *United States* v. *Giordano*, 419 F. 2d 564, 567 (C.A. 8), certiorari denied, 397 U.S. 1037; *Hinchcliff* v. *Clarke*, 371 F. 2d 697 (C.A. 6), certiorari denied, 387 U.S. 941. After an evidentiary hearing, the district court concluded that "the IRS's investigation of the tax liabilities of Pollack and of Associates * * * [was] a continuing one" and, therefore, that the second inspection

[2] *United States* v. *Pritchard*, 438 F. 2d 969 (C.A. 5), upon which petitioners rely (Pet. 11-12), is not to the contrary. There, it was undisputed that prior to the service of the summons the revenue agent had looked at all of the copies of the taxpayer's papers in the accountant's file. However, "[n]either the Government's petition [for enforcement] nor the agent's affidavit made reference to whether the information sought was in the Commissioner's possession" (438 F. 2d at 971). In those circumstances, the court concluded that the information was in the Commissioner's possession. Here, on the other hand, the district court was "convinced that the information which the IRS seeks to glean from the financial records which it has summoned is not information which is currently in the IRS's possession" (Pet. App. 13).

requirement of Section 7605(b) was inapplicable (Pet. App. 13). The court of appeals upheld this factual finding as supported by the evidence (*id.* at 8), and there is no need for further review. See *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635.

3. Finally, petitioners claim (Pet. 16-20) that the summonses should not be enforced because they were not served upon petitioner Myslajek personally or left at her "last and usual place of abode" (see Section 7603) but rather were served upon her adult son at her business office. Petitioner Myslajek, however, has never claimed that she was unaware of the summonses or their contents or that she was otherwise prejudiced by the form of service. As the court of appeals noted (Pet. App. 5-6), she appeared before the agent at the specified time without objecting to the method of service. In these circumstances, the court below correctly concluded that petitioner Myslajek waived any defect there may have been in service of the summonses. See *United States* v. *Gajewski*, 419 F. 2d 1088 (C.A. 8), certiorari denied, 397 U.S. 1040; *United States* v. *Ponder*, 475 F. 2d 37, 38-39 (C.A. 5).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

APRIL 1978.

DOJ-1978-04